IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1785

ROBERT GREGORY GROGAN, ET AL.,
Petitioners,

v.

COMMONWEALTH OF KENTUCKY,
Respondent,

and

CITY OF SOUTHGATE, KENTUCKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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May 29, 1979

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The petitioners Robert Gregory Grogan *et al.* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Kentucky entered in this proceeding January 16, 1979 and mandated February 27, 1979.

OPINION BELOW

The opinion of the Supreme Court of Kentucky is reported at 577 S.W.2d 4 (Ky. 1979) and is also set forth in Appendix C of this petition.

JURISDICTION

The opinion of the Supreme Court of Kentucky was filed January 16, 1979. A timely motion to reconsider was filed February 27, 1979. A mandate to the trial Court was also filed on February 27, 1979 and this petition was filed within ninety days of that mandate. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (2) and (3).

QUESTION PRESENTED

This appeal raises substantial federal questions of equal protection and due process of law with respect to the "public duty" doctrine. The doctrine is being arbitrarily and capriciously applied by the judiciary to create a constitutionally impermissible immunity for governmental entities. The doctrine has no statutory basis, and thus is not in any way a political question. This Petition is based upon the following issues:

I. Does the decision below holding that the public duty doctrine rendered the City of Southgate and the Commonwealth of Kentucky immune from suit violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

II. Does the decision below holding that the public duty doctrine rendered the City of Southgate and the Commonwealth of Kentucky immune from suit violate the First and Fourteenth Amendments of the Constitution as denying access to the Courts and due process?

STATEMENT OF THE CASE

On May 27, 1977 165 persons were killed and over 100 persons injured as a result of a fire at the Beverly Hills Supper Club in Southgate, Kentucky.

A comprehensive report concerning not only the factual cause of the fire but admitting negligence by certain state officials and other parties was released September 19, 1977. The report is entitled "Investigative Report to the Governor," and will hereinafter be referred to simply as the "Report,"[1] and illustrates the type of evidence that would be introduced at a trial against the Commonwealth. This report was introduced in the appeal to the Kentucky Supreme Court by the Appellants.

The Report states that the origin of the catastrophic Beverly Hills fire was electrical, and that "violations of the National Electric Code (NEC) abounded at Beverly Hills," and refers to the situation there as "an electrician's nightmare." Enumerating the violations of the Code, the Report continues:

> Although many National Electrical Code requirements are discernible only by an expert, most of those set forth below were obvious even to a layman. These included: failure to install a box or fitting at each outlet, switch point, juncture point, or conductor splice; absence of covers for outlet boxes; failure to securely fasten in place boxes, fittings, and cabinets; failure to place all wiring in metal raceways; absence of fittings; lack of proper grounding; absence of bushings; excessive number of conductors in a box; improper transformer installation; failure to close unused openings in boxes and fittings; and failure to make electrical installations so as to reduce to a minimum the possi-

[1] The Report is labeled for identification Appendix E but is not included in this Petition in the interest of brevity.

ble spread of fire through fire-stopped partitions and other similar walls.

The Report also lists equally flagrant violations of the National Building Code and National Fire Code and concludes: "The evidence establishing these violations is overwhelming." The Report cites overcrowding and blocked exits as a proximate cause of the tragic deaths and injuries suffered by these plaintiffs and their decedents in the conflagration.

The Report demonstrates that the State Fire Marshal had actual knowledge of numerous causative violations. He was warned about the situation by the Mayor of Southgate in a letter dated November 23, 1970. A deputy fire marshal discovered and reported ten specific violations of the Kentucky Standards of Safety. No final inspection was ever made by the State Fire Marshal's office to determine if these defects were corrected, and they were not corrected.

The State Fire Marshal also failed to discover habitual overcrowding of the premises, because such overcrowding only occurred in the evening hours when the club was in operation and the Fire Marshal's staff was not working.

The report also admits that the Fire Marshal "did not implement a proper inspection program which would have revealed the Code violations."

Numerous actions were filed in federal and state court on behalf of the decedents, the survivors of decedents, and those injured in the fire. Among those named as defendant were the City of Southgate and the Commonwealth of Kentucky. The complaints alleged negligent construction safety inspection, negligent inspection and enforcement of fire and safety regulations for capacity in buildings of public assembly and accomodation.[2]

[2] The pertinent parts of the Complaint are set forth in Appendix A.

The Defendants City of Southgate and the Commonwealth of Kentucky filed Motions to Dismiss in the state court on the grounds that no cause of action had been stated and/or that the actions against the Commonwealth were barred by the Kentucky Constitution § 231 and KRS § 44.070, *et seq*.[3] The trial court ruled that the Commonwealth of Kentucky was immune from suit as a consequence of the constitutional and statutory authority cited.[4] The City of Southgate was dismissed in a separate brief order. The Court, relying upon the cases cited by the City, held that no duty was owed by the City to the Plaintiff.[5] In both actions the plaintiffs invoked the due process and equal protection clauses of the United States Constitution. Timely separate appeals of both rulings were taken by the Plaintiffs to the Supreme Court of Kentucky and the cases were thereafter consolidated on appeal. Following briefing and oral argument in which the federal constitutional issues of equal protection and due process were raised and brief by the Plaintiff-Appellant, the Supreme Court of Kentucky in a *per curiam* opinion dated January 16, 1979 affirmed the Judgment of the Trial Court solely on the ground that the Plaintiffs had failed to state a claim against either the City of Southgate or the Commonwealth of Kentucky.[6] The Kentucky Supreme Court never reached the sovereign immunity issue raised by the Commonwealth.

[3] Neither the Constitutional nor statutory manifestations of Kentucky sovereign immunity are here supplied because the Court specifically refused to consider the doctrine's applicability.

[4] The Order of the Trial Court dismissing the Defendant Commonwealth is set forth in Appendix B-1.

[5] The Order of the Trial Court dismissing the Defendant City of Southgate is set forth in Appendix B-2.

[6] Appendix C sets forth the Opinion of the Supreme Court of Kentucky, which has also been reported at 577 S.W.2d 4 (Ky. 1979).

A Motion to Reconsider was filed on February 5, 1979 and was denied February 27, 1979. The Mandate of the Supreme Court of Kentucky was filed the same day.[7]

REASONS FOR GRANTING THE WRIT

Preface

The legal arguments contained herein are more clearly understood in the light of a short discussion of what the Kentucky Court did and did not decide in this appeal. The *Grogan* decision is purportedly not founded upon governmental immunity, and immunity is not a formal issue in this appeal; yet the doctrine overshadows much of the Court's opinion. In addition, the Court never directly confronts the actual consequence of its ruling. The succeeding prefatory sections attempt to frame the legal issues raised by this Petition.

A. The Opinion Below Creates Three Arbitrary Classifications of Tort Victims.

The doctrine of public duty, as it now exists in the Commonwealth of Kentucky, creates three classes of individuals who have suffered injury to their person or property. The first is that class of individuals injured or killed by some wrongful act or omission of a private person, such as where damages occur as a result of negligent inspections by an insurance company of insured premises. *Bryant* v. *Old Republic Ins. Co.*, 431 F.2d 1385 (6th Cir. 1970). Those individuals or their representatives have full and free access to the courts for litigation of their claims.

[7] The Mandates of the Court are set forth in Appendix D.

The second is that class of individuals injured or killed by an officer or agency of the state or a subdivision of the state where the person injured can demonstrate that the governmental entity negligently acted or failed to act in circumstances where a duty was owed not only to the public in general but to the injured individual in particular. In such a situation liability arises and the injured individual or their representatives may seek redress in the appropriate forum.

The third is that class of individuals injured or killed by a governmental officer or agency where the duty of due care breached is characterized as one owed only to the public in general and not to any specific class or individual.

Under the foregoing classification scheme a person injured or killed has a right to redress not by virtue of the wrong done to him but by a determination based solely on the characterization of the culpable defendant as private, or, if a governmental entity, whether its agents acted for the public in general or for a particular individual or class of individuals.

The Kentucky Supreme Court has simply abolished an established tort for a special class of defendants by declaring that, as a matter of law and without reference to any facts, no duty ran from the state fire marshal's office and the numerous state and city inspectors to any employee or patron entering this fire-trapped night club, and that in no circumstances might an employee or patron reasonably rely upon the premise that safety codes were being enforced for their benefit by the appropriate state and local agencies. The Court cannot, however, avoid completely the consequence of its ruling. The arbitrary effect is revealed in a single sentence:

> It is better to have such laws, even haphazardly enforced, than not to have them at all. 577 S.W.2d at 6.

The arbitrary and haphazard result is wrought from the Court's unsupported decision to insulate a special class of defendants from the consequences of their acts and omissions.

It is clear that a class of injured parties may not recover from the negligent party solely on the basis of the purely arbitrary fact that the negligent party is a governmental unit. It is also clear that the Court must resort to the fiction that these defendants could not have relied upon, and been injured as a result of, the scandalous conduct of government employees in this action. The logical extension of this holding is that, because government inspectors have no duty to anyone, no conduct, act or omission may be so outrageous as to state a cause of action. The fire marshal may conceivably approve of and permit the operation of discos as fronts for extermination camps without any legal compunction about a duty owed to the unfortunates who are gassed.

B. The Holding Below Totally Abrogates an Existing Cause of Action.

The Kentucky Supreme Court concedes in its opinion that a private-sector civil party which affirmatively undertook the inspections or the enforcement of specific safety and occupancy standards for a place of public assembly or accommodation would be liable in tort to those who are injured as a proximate result of the negligent execution of such undertakings; *See Bryant* v. *Old Republic Ins. Co.*, 431 F.2d 1385 (6th Cir. 1970). Such is, in fact the law. It is by now axiomatic that one who assumes to act may

become subject to the duty of acting carefully, Restatement of Torts 2nd § 324 A. This doctrine has been consistently applied to private-sector inspection agencies, *Bryand* v. *Old Republic Ins. Co., supra*; *Hill* v. *United States Fidelity and Guarantee Co.*, 428 F.2d 112 (5th Cir. 1970), and has been extended to governmental entities, *Smith* v. *State*, 93 Idaho 795, 473 P.2d 937 (1970), (missing flagman at railroad intersection); *Indian Towing Co., Inc.* v. *United States*, 350 U.S. 61 (1955), *In re M/T Alva Cape*, 405 F.2d 962, 968-969 (2nd Cir. 1969). It is clear that a cause of action may be stated against a governmental entity for injuries sustained from the negligent execution of a duty affirmatively undertaken.

The Court has alluded, in its discussion of *Modlin* v. *City of Miami Beach, Fla.*, 201 So.2d 70 (Fla. 1967) to the common-law principle that there must be more than some generalized duty of the defendant — be that defendant a private or public entity — in order to support liability. The Kentucky Courts have, however, failed to make or permit any inquiry as to whether, in light of the facts suggested by the Investigative Report, these governmental defendants had a particular duty to patrons and employees of the Beverly Hills. That Report indicates that the defendants were clothed with actual knowledge of severe defects and code violations at the Beverly Hills nearly seven years before this tragic fire, and that they never inspected for occupancy limitation compliance at a notoriously popular night club. Further, documents indicate the code violations at this specific club were noted in a letter from the Mayor of Southgate to the State Fire Marshal in 1970.

It is respectfully submitted that a specific duty to the patrons and employees of the Beverly Hills arises in such

circumstances. The purpose of the inspections made by the City of Southgate and the Kentucky State Fire Marshal was to discover and alleviate fire hazards endangering employees and patrons of the Beverly Hills. The plaintiffs or their decedents were members of the class intended to be protected by the inspection provided, and were foreseeable victims of the discovered fire hazards left uncorrected.

C. The Kentucky Supreme Court Has Specifically Excluded the Doctrine of Governmental Immunity from its Decision, and such a Doctrine is not at Issue in this Appeal.

The opinion of the Kentucky Supreme Court states "There being no basis for tort liability, the question of governmental immunity becomes irrelevant." While such a categorical statement would apparently preclude the governmental immunity issue from this appeal, the reasoning employed by the Court just prior to its "disposal" of the governmental immunity issue belies that assertion:

> The answer [to this controversy] must find its source in conscious public policy and the fundamental policy-viewpoint . . . is that a government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers (including, of course, those yet unborn) to liability for failures of omission in its attempt to enforce them. 577 S.W.2d at 6.

That reasoning may well aptly apply to the "non" issue of governmental immunity, but it provides no support for, and is irrelevant to, the issue of whether act *X* or omission *Y* may or may not form the basis of a legal claim. Whether the defendant can pay or not is irrelevant to the determination of whether a duty was undertaken or a liability incurred. Whether the government can pay is not relevant to whether a duty arose from the defendants' specific knowledge of the conditions which ultimately led to the foreseeable death and injury to plaintiffs' or their decedents. Whatever the policy reasons supporting governmental immunity, the Kentucky Court has eschewed them in this case. The Court may not thereafter rehabilitate the clothing of a self-declared non-issue into a suit for the otherwise bare bones of its public duty doctrine.

In *Adams* v. *State,* 555 P.2d 235 (Alaska 1976) the Supreme Court aptly anticipated the erroneous ruling of its sister Court:

> Second, we consider that the "duty to all, duty to no-one" doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine. An application of the public duty doctrine here would result in finding no duty owed the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private defendant would have owed such a duty, no "special relationship" between the parties existed. Why should the establishment of duty become more difficult when the state is the defendant? *Where there is no immunity, the state is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.* 555 P.2d at 241-242. (emphasis supplied).

With the understanding that the Respondent may not fall back upon sovereign immunity or its supporting policy considerations, this Court is petitioned to determine whether the public duty doctrine can withstand even the most casual constitutional scrutiny.

I.

THE DECISION BELOW HOLDING THAT THE PUBLIC DUTY DOCTRINE RENDERED THE CITY OF SOUTHGATE AND THE COMMONWEALTH OF KENTUCKY IMMUNE FROM SUIT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Fourteenth Amendment to the Constitution of the United States provides in part:

> ". . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

The equal protection clause of the Fourteenth Amendment prohibits a State from drawing a legal line which constitutes an invidious discrimination against a particular class of citizens. *Stanley* v. *Illinois,* 405 U.S. 645, 652 (1972); *Levy* v. *Louisiana,* 391 U.S. 68 (1968).

In determining whether a state-established classification violates the equal protection clause, the Court must decide whether duties or burdens different from those resting upon the general public are cast upon the class. *Atchinson, Topeka & Santa Fe R. Co.* v. *Matthews,* 174 U.S. 96, 104-05 (1899). The equal protection clause means that the rights of all citizens must rest upon the same rule under similar circumstances, and applies to the exercise of all the powers of a state which can affect the individual or his property. *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U.S. 32, 37 (1928); *Maxwell* v. *Bugbee,* 250 U.S. 525, 541 (1919). States may only make classifications where substantial differences of condition exist. *South Carolina ex rel. Phoenix Mut. L. Ins. Co.* v. *McMaster,* 237 U.S. 63, 72-73 (1915).

This Court in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), a case involving a Massachusetts' statutory scheme setting up tripartite classes of distributees of contraceptives, citing *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920), noted that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." More recently, the Court recognized that the arbitrary imposition of disabilities:

> is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing [and] . . . the Equal Protection Clause does enable us to strike down discriminatory law . . . where . . . the classification is justified by no legitimate state interest, compelling or otherwise. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175-176 (1972). *Jimenez* v. *Weinberger,* 417 U.S. 628, 632 (1974).

The *Jimenez* case involved a statutory disparity in availability of social security benefits between two classes of children. The government's legitimate interest propounded in support of the classification was that to grant "eligibility for such benefits * * * [the statutorily excluded class of] illegitimates would open the door to *spurious claims,* i.e., *fraudulent or collusive* claims." (Emphasis added). 417 U.S. at 634. The government argued that an "absolute bar to disability benefits is necessary to prevent spurious claims because '[t]o the unscrupulous person, all that prevents him from realizing . . . gain is the mere formality of a purious acknowledgment of paternity or a collusive paternity suit with the mother of an illegitimate

child who is herself desirous or in need of the additional cash.'" 417 U.S. at 635. The Chief Justice responded to the argument by noting:

> We recognize that the prevention of spurious claims is a legitimate governmental interest . . . . It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. . . . [T]he potential for spurious claims is exactly the same as to both subclasses. . . . Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws . . . . 417 U.S. at 636-637.

The concepts enunciated in *Jimenez* are applicable here. But for the public duty doctrine an individual injured by the wrongful acts of a public officer of a municipality or state would have an action to redress this action.[8]

The public duty doctrine imposes, in effect, an "irrebutable presumption" that recovery by an individual or class of individuals for negligent injury by a public official will inhibit enactment of laws for the public good. Since that presumption is not necessarily or universally true in fact, it is constitutionally invalid. In *Vlandis* v. *Kline,* 412 U.S. 441 (1973) an irrebutable presumption

[8]Even if the doctrine of sovereign immunity were invoked by the state, persons injured through the negligence of state officers could recover some relief from the Kentucky Board of Claims. See KRS 44.070. However, imposition of the public duty doctrine eliminates even that relief. *See e.g. Rosensweig* v. *State,* 5 App. Div.2d 293, 171 NYS2d 912 (3d Dept. 1958), aff'd 5 N.Y.2d 404, 158 N.E.2d 229, 185 NYS2d 521 (1959).

was imposed against Connecticut college students who, after entering college as non-residents were conclusively presumed to remain in that category while enrolled. This Court struck down the presumption as a denial of due process. The logic of *Vlandis* applies with equal force here. The public duty doctrine conclusively precludes a "remedy by due course of law" to injured persons even though the evils assumed by the Commonwealth to justify the doctrine may not obtain.

The opinion below draws a distinction between an injured party with some sort of privity to the government or its agents – whether by contract or otherwise – and an injured party harmed as a result of negligent conduct arising from a duty "owed generally to the public."[9] The Court implies, without so stating, that if a plaintiff can demonstrate that a governmental defendant had more than a general duty to the public, then recovery may yet be possible.

Whatever legitimate purpose there may be for distinguishing between generalized and specific governmental duties has in many states been manipulated to improperly immunize governmental defendants, *Adams* v. *State, supra,* 555 P.2d at 241. The public duty doctrine, properly construed, does not hold a governmental defendant liable for the consequences of all of the fire hazards within the scope of its duty to inspect. In *Adams* a government is held answerable only to those within the foreseeable consequences of fire hazards for which the government voluntarily inspected, actually discovered and failed to seek correction.

[9] It is unclear whether this distinction actually provides the basis for the Court's dismissal. The Court apparently adopts the much criticized "duty to all, duty to none" doctrine set forth in *Modlin* v. *City of Miami Beach, Fla.,* 201 So.2d 70 (1967), but later states that it has not relied upon that case and does not find the Florida Court's line of reasoning satisfactory.

Under such an interpretation the state is not exposed to the consequences of every fire in the state — even those caused by hazards. When specific hazards are discovered, noted and yet still permitted to continue unabated by the state agency charged with enforcement, the relationship (of the state to those who are foreseeable victims of such horrible negligence) is more than general, *Id.* at 242. *See also Griffin* v. *United States,* 500 F.2d 1059, 1070 (3rd Cir. 1974) and *Campbell* v. *City of Bellevue,* 85 Wash. 2d 1, 530 P.2d 234, 241 (1975).

By upholding a dismissal on the pleadings, however, the Court holds as a matter of law that regardless of the facts no specific duty ever arises on the part of those charged with responsibility for enforcing fire and building codes or securing the safe occupancy levels of specific places of public assembly, no matter how specific the knowledge of such officials concerning hazards to foreseeable plaintiffs.

In reviewing state-established classifications the Supreme Court has utilized two tests to determine whether the equal protection clause is violated. Under either of these tests, the classifications created by the Kentucky Supreme Court fail to pass constitutional muster.

A. The Classifications Created by the Kentucky Supreme Court Must Be the Subject of Strict Judicial Scrutiny. They Cannot Be Upheld Because They Are Not Supported by a Compelling State Interest.

Where fundamental rights and liberties are asserted under the equal protection clause, classifications which might invade or restrain them must be strictly scrutinized. *Shapiro* v. *Thompson,* 394 U.S. 618, 638 (1969); *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 670 (1966); *Griswald* v. *Connecticut,* 381 U.S. 479 (1965). Under this standard of review, the doctrine creating the classification is unconstitutional unless supported by a compelling state interest. *Eisenstadt* v. *Baird,* 405 U.S. 438, 447 n.7 (1972); *Dunn* v. *Blumstein,* 405 U.S. 330, 342 (1972).

Meaningful access to the courts is a fundamental right guaranteed by the due process, privileges and immunities and petition for redress of grievances clauses of the United States Constitution. Accordingly, there must exist a compelling state interest in maintaining the classification created by the Kentucky Supreme Court. The only reason advanced for the classifications is to protect governmental treasuries. This reason does not rise to a compelling state interest.

It has long been the law of this country that citizens may not be compelled to forego their constitutional rights under the equal protection clause of the Fourteenth Amendment merely because state officials fear public hostility or desire to save money. *Palmer* v. *Thompson,* 403 U.S. 217, 226 (1971).

In the present case the Court has chosen to eradicate a limited tort remedy on a completely inappropriate and invalid premise.

The depletion of a governmental treasury is an appropriate policy premise for *immunity*. If governmental immunity were the issue in this case, perhaps the cost to the governmental entity might be a valid consideration. The Court has said immunity is not an issue, and must be held to provide a compelling reason why a duty is not a duty when the offending party is the government. The cost to the government is irrelevant to the duty it owes in a given circumstance.

Assuming *arguendo* that cost is a valid factor in determining whether a cause of action is stated, the premise that governmental entities will be bankrupted is not supported by any record. The same dire predictions accompanied the abolition of charitable and municipal immunity, with none of the promised catastrophe. A similar argument has been proposed concerning elimination of sovereign immunity. Studies show that such fears are groundless. See Note, *State Tort Liability for Negligent Fire Inspection*, 13 COLUMBIA J. OF LAW AND SOCIAL PROBLEMS 303, 346-347 (1977); Note, *Economic Analysis of Sovereign Immunity in Tort*, 50 S. CAL. L. REV. 515 (1977). Prevention or inhibition of enactment of laws is not furthered by a public duty doctrine that imposes arbitrary differential treatment on similarly situated victims of negligent acts of public officers.

More important, the limited premise of this case will not open governments and "generations of unborn taxpayers" to limitless liability. For the purposes of this case a governmental duty arises only when a government has specific and actual knowledge of conditions which pose a threat to foreseeable victims. The plaintiffs are not seeking to impose liability for the actual fire hazards or the mere fact of inspection. The duty asserted against these defendants arises from:

a) a voluntary assumption of inspection and enforcement acts; *and*

b) actual knowledge of defects and code violations at the Beverly Hills; *and*

c) the foreseeability that patrons and employees could be victimized by the defects and code violations; *and*

d) proximate cause.

Under such a test the governmental unit could and would never be answerable in tort for the great majority of fires. Only when armed with actual knowledge would it be chargeable.

In short, the "bankruptcy" premises advanced by the Respondent and adopted by the Court is unsupported by any record and is a totally improper basis for establishing – or denying – a duty. Convenience cannot outweigh an individual's right to be compensated for actual damages sustained and injuries suffered. *Brown* v. *Wichita State Univ.*, 217 Kan. 279, 540 P.2d 66, 83 (1975); *Muskopf* v. *Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961).

B. The Classifications Created by the Kentucky Supreme Court Do Not Rest Upon A Rational Basis.

Even if this Court should determine that the strict scrutiny test was inappropriate, the classifacation created by the *Grogan* Court fails to satisfy the traditional equal protection test. Under this test, the Court examines the classification to determine if a rational basis or a rational nexus with a valid legislative purpose exists for it. *See, e.g. McGowan* v. *Maryland*, 366 U.S. 420 (1961). The Commonwealth certainly cannot claim that corporations or indi-

viduals who negligently injure someone are better able to bear the financial responsibilities that are a consequence of their wrongdoing than is the Commonwealth itself.

It may indeed be that the best possible demonstration that the classification the plaintiff attacks is devoid of a rational basis appears in the Court's own opinion. The Court states that "It is better to have such laws, even haphazardly enforced, than not to have them at all." The effect of the classification system established by the Court, however, leads inevitably to the corollary principle that "it is better to have tort liability arbitrarily enforced than not at all." That policy strikes at the heart of federal equal protection guarantees.

All that the plaintiff seeks is that a government be held to the same standards as any other tortfeasor. That is the essence of the "equal protection of the laws." The courts have not hesitated to strike down an invidious classification even though it had history and tradition on its side. *Levy* v. *Louisiana,* 391 U.S. 68, 71 (1968). This Court can do no less.

II.

THE DECISION BELOW HOLDING THAT THE PUBLIC DUTY DOCTRINE RENDERED THE CITY OF SOUTHGATE AND THE COMMONWEALTH OF KENTUCKY IMMUNE FROM SUIT IS VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION AS DENYING ACCESS TO COURTS AND DUE PROCESS.

A. The Eradication of Existing Causes of Action Against Governmental Entities and Governmental Employees Solely on the Basis of Governmental Status Violates Fundamental Rights Guaranteed by the Due Process Clause of the Fourteenth Amendment.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 1, Amendment XIV
> United States Constitution

The due process clause of the Fourteenth Amendment was intended to preserve and protect fundamental legal rights. *Butler* v. *Perry,* 240 U.S. 328, 333 (1916). The due process clause restrains a State from unreasonably and unjustly impairing or destroying fundamental rights. *American Land Co.* v. *Zeiss,* 219 U.S. 47 (1911).

Meaningful access to the courts is a fundamental right guaranteed by the due process clause. *Wolff* v. *McDonnell,* 418 U.S. 539, 579 (1974); *Procunier* v. *Martinez,* 416 U.S. 396, 419 (1974).

Further, a right of action to recover damages for an injury is considered to be property for purposes of the due process clause, and neither the judicial, legislative nor executive branch of government of a state has the power to destroy such property. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 680 (1930); *Angle* v. *Chicago, St. P.M. & O.R. Co.,* 151 U.S. 1, 19 (1894).

The public duty doctrine, as noted above, deprives victims of injuries wrongfully inflicted by public officers from effective access to courts, even though the Kentucky Constitution provides:

> All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Ky. Const. § 14.
>
> Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person. Ky. Const. § 241.
>
> The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property. Ky. Const. § 54.

Numerous other state constitutions specifically provide for a right to access to courts for redress of wrongs by due

course of law,[10] lending weight to the fundamental character of the right to access to courts.

This Court in *Boddie* v. *Connecticut,* 401 U.S. 371 (1971) dealt squarely with the issue of access to the courts as a due process requirement.

In *Boddie* an indigent, desiring to obtain a divorce, challenged a state statute which required payment of court filing and process fees as a condition precedent to gaining access to the divorce court. This Court held the statute to be violative of due process of law because it denied to indigents access to the only remedy available to obtain the kind of relief desired.

Reasonable access to the courts, especially in a case such as the one at bar where a person's life has been taken or his ability to function normally and earn a livelihood has been destroyed, is a *fundamental right* in our society. See *Boddie* v. *Connecticut, supra*; *Weber* v. *Aetna C. & Sur. Co.,* 406 U.S. 164 (1972); *Levy* v. *Louisiana,* 391 U.S. 68 (1968).

The *carte blanche* destruction of a cause of action against governmental entities and employees eliminates any meaningful access to the courts for the plaintiffs. The holding (that governmental entities have no duty in circumstances in which ordinary civil persons are clearly liable) totally frustrates the plaintiff from having his day in court and his opportunity to prove the liability of the Commonwealth and the City of Southgate. That doctrine also

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[10] *See, e.g.,* the following state constitutional provisions: Ala. Art. 1, § 13; Colo. Art. 2, § 6; Conn. Art. 1, § 12; Del. Art. 1, § 9; Fla. Declaration of Rights § 4; Idaho Art. 1, § 18; Ind. Art. 1, § 12; La. Art. 1, § 6; Maine Art. 1, § 19; Miss. Art. 3, § 24; Mont. Art. 3, § 6; Neb. Art. 1, § 13; N.H. Art. 1, § 14; N.C. Art. 1, § 35; N.D. Art. 1, § 22; O. Art. 1, § 16; Oka. Art. 2, § 6; Pa. Art. 1, § 11; S.D. Art. 6, § 20; Tenn. Art. 1, § 17; W. Va. Art. 3, § 17.

eradicates the plaintiff's right to recover damages for injuries sustained because of another's wrongdoing.

As this Court observed in *Eisenstadt* v. *Baird, supra,* where a statute impinges on a fundamental right "the statutory classifications would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest." 405 U.S. at 265, n.7. As noted in Part I above, there is not even a rational basis to justify the imposition of the public duty doctrine, and *a fortiori* no compelling state interest is available.

B. The Eradication of an Existing Cause of Action Against Governmental Entities and Governmental Employees Solely on the Basis of that Governmental Status Violates Rights Guaranteed by the Privileges or Immunity Clause of the Fourteenth Amendment.

The Supreme Court of the United States has never attempted to formulate a complete list of the rights included within the privileges and immunities provision of the Fourteenth Amendment. The Supreme Court has, however, concluded that the rights included in the privileges or immunities clause are those which by their very nature are fundamental. *Canadian Northern R. Co.* v. *Eggen,* 252 U.S. 553, 560 (1920); *Chambers* v. *Baltimore & O.R. Co.,* 207 U.S. 142, 155 (1907); *Blake* v. *McClung,* 172 U.S. 239, 248 (1898); *Slaughter-House Cases,* 16 Wall. 36, 75 (1872).

While the outer limits of the privileges or immunities clause are not precisely defined, it is clear that the Supreme Court has considered a citizen's right of access to the courts of the states to be both a fundamental right and a privilege or immunity protected by the Fourteenth Amendment for over one hundred years.

The Supreme Court's first occasion to consider the Fourteenth Amendment occurred in the *Slaughter-House Cases,* 16 Wall. 35, (1872):

> It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. *He has the right of free access to* its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land-offices, and *courts of justice in several states.*" 16 Wall. at 79 (emphasis added).

See also, Canadian Northern R. Co. v. *Eggen,* 252 U.S. 553, 560 (1920), and *Angel* v. *Bullington,* 330 U.S. 183 (1947):

> The Contract Clause, the Full Faith and Credit Clause, the *Privileges or Immunities Clause,* all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction, "the adjective law of the State," or the exercise of its right to regulate "the practice and procedure" of its courts. 330 U.S. at 188.

The doctrine enunciated by the Kentucky Supreme Court in *Grogan* which prohibits citizens from seeking compensation from the wrongdoing of the Commonwealth, the City of Southgate or their agents in the courts of the Commonwealth denies those citizens and this plaintiff the fundamental right of access to the courts in violation of the privileges or immunities clause of the Fourteenth Amendment.

C. The Eradication of an Existing Cause of Action Against Governmental Entities and Governmental Employees Solely on the Basis of that Governmental Status Violates Fundamental Rights Guaranteed by the Redress of Grievances Provision of the First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Amendment I
> United States Constitution

The right guaranteed by the First Amendment of petitioning the Government for redress of grievances is protected by the Fourteenth Amendment from invasion by the States. *United Mine Workers* v. *Illinois State Bar Assoc.*, 389 U.S. 217, 221 n.4 (1967); *Whitehall* v. *Elkins*, 389 N.S. 54, 57 (1967); *Gideon* v. *Wainwright*, 372 U.S. 335, 341 (1963); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963).

The complaint filed by the Plaintiff in the Campbell County Circuit Court in Kentucky seeks damages from the Commonwealth as a result of its wrongful conduct which caused injury and death to the plaintiffs or to plaintiff's decedent. The right of petition insured by the First Amendment includes economic grievances. *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945).

Further, it is well established that the right to petition for redress of grievances extends to all departments of Government. The right of access to the courts is but one aspect of the right of petition. *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). A civil suit against the government or one of its units is one form of exercise

of the constitutional right to petition the government for a redress of grievances. *People* v. *Siragusa*, 366 N.Y.S.2d 336, 342, 81 Misc.2d 368 (Nassau County Dist. Ct. 1975). As the holding in *Grogan* deprives plaintiff of his right of access to the courts, it also infringes on plaintiff's right to seek redress for an economic grievance against the Commonwealth and the City of Southgate.

D. The Denial as a Matter of Law of any Cause of Action Against Governmental Entities or Governmental Employees, without Any Consideration of the Underlying Facts Which May Control the Issues of Duty and Liability, Denies the Plaintiffs Procedural Due Process and Unfettered Access to the Courts.

As has been previously noted, the Supreme Court of Kentucky has held that the Plaintiffs' claims of duty and liability do not as a matter of law state a claim. The Supreme Court affirmed the trial court's dismissal on the pleadings. The Court's *per curiam* opinion demonstrates conclusively that *under no set of facts* can a claim be stated against these governmental defendants. Such a holding denies the plaintiffs an opportunity to even present evidence on those issues essential to every tort case — the duty of the defendant to the plaintiff. This total preclusion denies to the plaintiffs the procedural due process to which all litigants are entitled — the right to present witnesses on issues of fact.

Assuming *arguendo* that the state may constitutionally distinguish between (a) duties running to the public generally and (b) duties running to specific individuals who can reasonably be foreseen to be harmed by a negligent performance of that duty, it is incumbent upon the trial court to hear the evidence upon the nature of the duty and

the foreseeable harm. The *Grogan* opinion, does not, however, remand for a consideration of such issues, notwithstanding proffered evidence from the Investigative Report indicating that certain defendants had specific knowledge of dangerous conditions which would place the plaintiffs within the ambit of foreseeable risk. The failure to require a hearing upon such an issue confronts the Plaintiffs with a "Catch-22" procedural situation. In order to state a claim, the plaintiffs must show more than a general duty owed by the government or its employee to the injured party. Almost all governmental "duties" operate for the general benefit of society. In order to establish a more specific duty, particular facts must be placed in evidence. Yet if a complaint such as that submitted by these plaintiffs may be dismissed on its face without an examination of the underlying circumstances and hazards supporting the alleged duty, then a plaintiff will always be procedurally precluded from advancing his claim before a court. Such a result amounts to a denial of due process and access to the courts that violates constitutional guarantees.

CONCLUSION

When the Commonwealth of Kentucky or one of its municipalities, the City of Southgate, can, through the wrongful acts of its agents and in violation of its explicit official statutory responsibilities to its citizens, inflict extensive damage to person and property without being required to render compensation to the dead and injured by virtue of the public duty doctrine, the Equal Protection and Due Process Clause of the Fourteenth Amendment are rendered meaningless. The peremptory and arbitrary classifications established by the Supreme Court of Kentucky in this case raise important questions of constitutional

law and the public duty doctrine which have not been but which should be expressly settled by this Court. The proper resolution of the constitutionality of the public duty doctrine is important not only to the survivors of the 165 persons killed and the 100 injured in the tragedy, but to every citizen of the United States who may some day stand in the shoes of these petitioners. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the Commonwealth of Kentucky.

Respectfully submitted,

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APPENDIX A

EXCERPT FROM COMPLAINT

SIXTH CAUSE OF ACTION

15. Plaintiff realleges and reaffirms all of the allegations contained in paragraphs 1 through 14, with the same force and effect as if fully rewritten herein, and for his Sixth Cause of Action states:

16. That the defendant, the Commonwealth of Kentucky, and the defendant, the City of Southgate, had duties mandated by statute of enforcement of regulations with regard to the construction, design, maintenance, fireproofing, firefighting, exiting, and crowd control of all public buildings within the Commonwealth of Kentucky and the City of Southgate, and as such they owed certain duties to the plaintiff's decedent, Elmer Lee Ellison, that they breached, in that they:

a. Failed to establish and/or enforce occupancy limits;

b. Failed to properly supervise and inspect the construction of the Beverly Hills Supper Club;

c. Improperly approved for construction the plans submitted by the defendants for the construction of the Beverly Hills Supper Club;

d. Failed to conduct periodic fire inspections;

e. Failed to cite violations of existing statutes, codes, ordinances, and regulations of the Commonwealth of Kentucky or the City of Southgate pertaining to federal regulations, or enforce same;

f. Failed to provide adequate fire-fighting equipment and personnel;

g. Permitted the defendants to operate a public building when they knew, or should have known, that said building presented a serious hazard of fire with resulting loss of life;

h. Failed to heed the warnings of individuals with regard to existence of violations of building codes and fire regulations;

All of which was the direct and proximate cause of plaintiff's decedent's death.

COUNT III

8. Plaintiffs reiterate and adopt by reference all of the previous averments herein.

9. The fire aforedescribed and the death of plaintiffs' decedent were also direct and proximate results of the negligence of defendant, Commonwealth of Kentucky, in failing to do all things necessary by way of enacting proper regulations and/or enforcing existing regulations relative to the construction and design, management, and operation of said establishment, for the prevention of said fire and the proliferation of same, on behalf of the safety and welfare of the patrons and other occupants of said establishment, knowing the nature of said establishment and the uses to which it would be put involving crowds and crowded conditions.

APPENDIX B-1

TRIAL COURT ORDER DISMISSING COMMONWEALTH OF KENTUCKY

CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

In RE:

BEVERLY HILLS FIRE LITIGATION
This Order Applies to All Cases

ORDER AND OPINION

(Filed November 18, 1977)

The defendant, Commonwealth of Kentucky, having moved this Court, pursuant to CR 12.02, to dismiss these consolidated actions as to the Commonwealth upon the grounds that the action is barred by Section 231 of the Kentucky Constitution and the doctrine of sovereign immunity, the Court having considered the record herein, memoranda of law submitted by the parties, having heard oral argument, and being otherwise duly advised, it is hereby

ORDERED that this action be, and the same is hereby dismissed as to the defendant, Commonwealth of Kentucky. Section 231 of the present Kentucky Constitution provides:

> "Section 231 Suits against the Comonwealth. The General Assembly may, by law, direct in what manner and in what Courts suits may be brought against the Commonwealth."

This Section sets forth an explicit, relatively simple concept. The doctrine of sovereign immunity has been embedded in each of Kentucky's four Constitutions. The Supreme Court of Kentucky has construed this Section of the Constitution in a number of cases and its decisions have, consistently over the years, upheld this doctrine and Constitutional provision. Suits against the Commonwealth may be brought as a matter of legislative grace. Only by authority of an enactment of the General Assembly (Legislature) may such a suit be brought, and then the manner of bringing a suit and the Court in which it may be brought must be directed (*Foley Construction Company* v. *Ward*, Ky., 375, SW2d, 392 (1964); *Smith* v. *Commonwealth, Department of Highways*, Ky., 495, SW2d, 178 (1973) and *George M. Eady Co.* v. *Jefferson County*, Ky., 551 SW2d, 571 (1977).

The General Assembly in enacting KRS 44.070(5) exercised its right to determine the proper forum where claims against the Commonwealth, its agencies, departments, officers or employees are concerned. A clear-cut line of precedents, not shown to be logically inconsistent with a wider body of constiutional decisions, should be given great weight in later cases. The weight is difficult to measure, but it should be so great as to outweigh the argument for change unless one is pretty clear that the change is impelled by one of the deeper lasting currents of human thought that give direction to the law.

Constitutional adjudication depends upon a delicate, symbiotic relation.

The exercise by Courts of the power of judicial review even when unavoidable, is always attended with a serious evil, namely that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that

comes from fighting the question out in the ordinary way, in correcting their own errors. The tendency of a common and easy resort to this great function is to dwarf the political capacity of the people and to deaden its sense of moral responsibility.

For the foregoing reasons and because this Court does not have jurisdiction over the Commonwealth of Kentucky in this action, the complaint as to the Commonwealth must be dismissed.

This Order is a final and appealable Order.

This is a final Order and Judgment and there is no just reason for delay.

/s/ JOHN A. DISKIN
Judge

APPENDIX B-2

TRIAL COURT ORDER DISMISSING CITY OF SOUTHGATE

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
DIVISION NO. ONE

IN RE:

BEVERLY HILLS FIRE LITIGATION
This Document Relates to All Actions

ORDER AND JUDGMENT

(Filed November 29, 1977)

Upon motion of the City of Southgate, Kentucky, defendant herein, for judgment on the pleadings pursuant to Civil Rule 12.03, and dismissal of these actions as to this defendant, the Court having considered the record herein, memoranda of law submitted by the parties, having heard oral argument and being otherwise sufficiently and duly advised, it is hereby

ORDERED AND ADJUDGED that the aforesaid motion of the City of Southgate be sustained, and the same are hereby dismissed as to the Defendant, City of South-

gate, Kentucky, by virtue of the decisions of the Supreme Court of Kentucky in *Frankfort Variety, Inc., et al,* v. *City of Frankfort, Kentucky* (KY, 1977) 552 S. W. 2d, 653 and *City of Louisville* v. *Louisville Seed Company* (KY, 1968) 433 S. W. 2d, 638, and the cases, reasoning and authority cited therein.

This is a final Judgment and there is no just reason for delay.

This the 29th day of November, 1977.

/s/ JOHN A. DISKIN,
Judge

APPENDIX C

OPINION OF THE SUPREME COURT OF KENTUCKY ISSUED JANUARY 16, 1979

SUPREME COURT OF KENTUCKY

SC-618-TG

ROBERT GREGORY GROGAN, CO-ADMINISTRATOR OF ESTATE OF DONNIE CLYDE GROGAN, DECEASED, ET AL.
APPELLANTS

vs.

COMMONWEALTH OF KENTUCKY
APPELLEE

78-SC-195-TG

ROBERT GREGORY GROGAN, CO-ADMINISTRATOR OF ESTATE OF DONNIE CLYDE GROGAN, DECEASED, ET AL.
APPELLANTS

vs.

CITY OF SOUTHGATE, KENTUCKY
APPELLEE

Appeal From Campbell Circuit Court
Hon. John A. Diskin, Judge
#13858

PER CURIAM

AFFIRMING

On May 28, 1977, a fire at the Beverly Hills Supper Club in the City of Southgate, Kentucky, resulted in a great number of deaths and personal injuries. Shortly thereafter numerous injured parties and personal representatives of those who had lost their lives filed damage suits in the Campbell Circuit Court. In all of these actions, which in due course were consolidated, the City of Southgate and the Commonwealth of Kentucky were named as defendants. The plaintiffs now appeal from separate judgments dismissing the actions, on the pleadings, as to the city and the Commonwealth. Each of the two appeals is submitted on an agreed statement under CR 75.15 and has been briefed and argued accordingly.

We shall discuss the city case first, because its resolution disposes of the Commonwealth case without requiring consideration of the sovereign-immunity question.

It was settled in Haney v. City of Lexington, Ky., 386 SW 2d 738, 742 (1964), that the doctrine of sovereign immunity no longer protects municipal corporations in this state from tort liability. Later, however, in City of Louisville v. Louisville Seed Company, Ky., 433 SW 2d 638 (1968), it was made clear that cities are different creatures from natural persons, private corporations, and other suable entities, and that the fundamental bases for tort liability are not necessarily the same for all of them in all situations.

As observed in Frankfort Variety, Inc. v. City of Frankfort, Ky., 552 SW 2d 653, 655 (1977), our most recent opinion on the subject, "a city's relationship to individuals and to the public is not the same as if the city itself were a private individual or corporation, and its duties are not

the same. When it undertakes measures for the protection of its citizens, it is not to be held to the same standards of performance that would be required of a professional organization hired to do the job. If it were, it very well might hesitate to undertake them. . . . A city cannot be held liable for its omission to do all the things that could or should have been done in an effort to protect life and property."

Broadly speaking, the theory on which the city's liability is premised is that it failed to enforce laws and regulations, including its own, establishing safety standards for the construction and use of buildings within its corporate limits, and that its failures in this respect were a substantial factor in causing the tragedy. In other words, the charge is that the city did not enforce a law or laws designed for the safety of the public and that its taxpayers must therefore bear a loss occasioned by someone else's failure to comply with the law.

Though appellants indulge the facile assumption that under similar circumstances a private individual would be liable at common law, we do not believe that the common law, as applied to individuals, offers any reasonably comparable analogy. There is, of course, the familiar principle that one who undertakes the care of another, or of his property, even though it be voluntary and without consideration, owes him the duty of reasonable care. But in the enactment of laws designed for the public safety a governmental unit does not undertake to perform the task; it attempts only to compel others to do it, and as one of the means of enforcing that purpose it may direct its officers and employes to perform an inspection function. The failure of its officers and employes to perform that function "does not constitute a tort committed against an individual who may incidentally suffer injury or damage,

in common with others, by reason of such default." City of Russellville v. Greer, Ky., 440 SW 2d 269, 271 (1969). The law that applies to this case has been carefully considered, clearly enunciated, and firmly settled in City of Louisville v. Louisville Seed Company, Ky., 433 SW 2d 638 (1968); City of Russellville v. Greer, Ky., 440 SW 2d 269, 271 (1969); and Frankfort Variety, Inc. v. City of Frankfort, Ky., 552 SW 2d 653, 655 (1977). These precedents do not restore the doctrine of sovereign immunity, nor do they evince a retreat toward it. Haney v. City of Lexington, Ky., 386 SW 2d 738, 742 (1964), erased the arbitrary distinction between governmental and proprietary activities, thus extending a city's exposure to tort liability into the realm of "governmental functions," but it did not purport to create new torts. As it happens, the existence of the sovereign-immunity doctrine served to prevent a normal development of common-law tort principles in the field of municipal liability until recent times, and the subject cannot reasonably be covered by fitting it out with a ready-made suit of clothes borrowed from the law of torts as it applies to individuals and private corporations. They simply are not the same animals.

In Modlin v. City of Miami Beach, Fla., 201 So. 2d 70 (1967), a shopper in a retail store was killed when an overhead storage mezzanine collapsed upon her. In a wrongful-death suit against the city in which the store was located the complaint alleged negligent inspection by the city during construction of the building. Conceding that the residue of municipal immunity theretofore retained in an earlier opinion did not apply, a divided court nevertheless held that there was no tort liability: "It is a well recognized principle of tort law that a fundamental element of actionable negligence is the existence of a duty owed by the person charged with negligence to the person injured. . . .

However, there is also a doctrine of respectable lineage that holds that this duty must be something more than the duty that a public officer owes to the public generally . . . . It is evident that under this principle the respondent city's inspector would not have been personally liable . . . . Therefore, the city is not liable under the rule of respondeat superior." *Id*, at 201 So. 2d 75, 76.

We cite this line of reasoning by the Florida court not because we find it a satisfactory answer, but in order to illustrate that even by resort to common-law logic the appellants have no case against the city. We acknowledge, however, that a legal problem of this magnitude should not be resolved by the tricks of mechanical logic. The answer must find its source in conscious public policy, and the fundamental policy-viewpoint on which this court has settled during the 15 years since Haney v. City of Lexington, Ky., 386 SW 2d 738 (1964), is that a government ought to be free to enact laws for the public protection without thereby exposing its supporting taxpayers (including, of course, those yet unborn) to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.

What we have said thus far with regard to the city's responsibility applies with equal force to the Commonwealth. There being no basis for tort liability, the question of governmental immunity becomes irrelevant. The answer to the argument that federal constitutional rights are violated by any result that has the effect of shielding governmental bodies from liability that would attach except for their status is that the principles articulated in our previous cases and applied here do not have that effect. To the contrary, that status would be the only basis *for* holding a city or state liable, because only a governmental entity possesses the authority to enact and enforce laws for the protection of the public. Hence it is that in delineating the areas and extent of public responsibility we are dealing with a subject quite apart and different from the world of individual and corporate relationships. There being no reasonable basis for comparison, there can be no discrimination.

The judgments are affirmed.

All concur.

APPENDIX D-1

MANDATE – COMMONWEALTH OF KENTUCKY

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

MANDATE

File No. SC-618-TG
Opinion Rendered January 16, 1979

ROBERT GREGORY GROGAN, CO-ADMINISTRATOR OF THE ESTATE OF DONNIE CLYDE GROGAN, DECEASED, ET AL.

vs.

COMMONWEALTH OF KENTUCKY
Appeal From Campbell Circuit Court
Action No. 13858

The Court being sufficiently advised, and this Court's per curiam opinion having been rendered January 16, 1979, it is therefore considered that the judgment of the Campbell County Circuit Court is affirmed, which is certified to said court.

February 27, 1979 Appellant's Petition for Rehearing Denied.

A Copy – Attest:

/s/ MARTHA LAYNE COLLINS,
CLERK

Issued February 27, 1979

APPENDIX D-2

MANDATE – CITY OF SOUTHGATE, KENTUCKY

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

MANDATE

File No. 78-SC-195-TG
Opinion Rendered January 16, 1979

ROBERT GREGORY GROGAN, CO-ADMINISTRATOR OF THE ESTATE OF DONNIE CLYDE GROGAN, DECEASED, ET AL.

vs.

CITY OF SOUTHGATE, KENTUCKY
Appeal From Campbell Circuit Court
Action No. 13858

The Court being sufficiently advised, and this Court's per curiam opinion having been rendered January 16, 1979, it is therefore considered that the judgment of the Campbell County Circuit Court is affirmed, which is certified said court.

February 27, 1979 Appellant's Petition for Rehearing Denied.

A Copy – Attest:

/s/ MARTHA LAYNE COLLINS,
CLERK

Issued February 27, 1979

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari have been served on A. J. Jolly, 30 West Fourth Street, P.O. Box 368, Newport, Kentucky 41072; Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; and Victor Fox, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, on this 29th day of May, 1979.

STANLEY M. CHESLEY
Attorney for Appellant